

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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THE JOHNS HOPKINS UNIVERSITY, : CIVIL ACTION
A Maryland Corporation, :
BAXTER HEALTHCARE CORPORATION, :
A Delaware Corporation, :
and BECTON DICKINSON AND :
COMPANY, A New Jersey :
Corporation, :

Plaintiffs :

v. :

CELLPRO, A Delaware :
Corporation, :

Defendant :

NO. 94-105 (RRM)

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Wilmington, Delaware
Monday, March 3, 1997
11:03 o'clock, a.m.

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BEFORE: RODERICK R. MCKELVIE, U.S.D.C.J.

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APPEARANCES:

POTTER, ANDERSON & CORROON
BY: WILLIAM J. MARSDEN, JR., ESQ.

Counsel for Plaintiffs

Valerie J. Gunning
Official Court Reporter

1 Baxter is using — I'm not sure of the designation, but
2 I think it's something like 9C5.

3 MR. WARE: Yes. 9C5. They had these
4 antibodies and they acquired them in their license from
5 Becton Dickinson in 1990. So they had them. They had
6 them at the time of the hypothetical negotiation of
7 CellPro. They had seven or eight total different
8 antibodies.

9 THE COURT: And they weren't commercializing
10 them?

11 MR. ELLIS: They hadn't even started to try,
12 your Honor.

13 Let me, if I may, try to put this in a little
14 context, because I think what's been going on here is
15 more than a little misleading.

16 Becton Dickinson — there was an argument,
17 Well, Becton Dickinson had this license previously.
18 Becton Dickinson is in the diagnostic business. It's not
19 in the business of making therapeutic products. And I
20 don't think there's any evidence, — if there is, I am
21 not aware of it — Becton Dickinson attempted to develop
22 a therapeutic product. That was one of the reasons that
23 they decided to shop around the sublicense to Baxter and
24 others — Baxter was not the only person, as I understand
25 it, to whom that sublicense was offered.

1 As a document that Mr. Bloomberg is fond of
2 points out — it's a Baxter document from late '89 says,
3 Baxter was concerned at that point. It had no product.
4 It was not attempting to develop a CD34-positive product.
5 But they said internally, This is a potentially valuable
6 product. If we don't take this sublicense, somebody
7 else will and do something valuable with it. And we may
8 be disadvantaged by that.

9 So they started negotiating, Becton Dickinson,
10 around that time, and in August of 1990, just a couple of
11 months before the hypothetical negotiation, they had
12 acquired the license.

13 Now, at that time, so far as I know, there is
14 no evidence that Baxter then or indeed, for some period
15 of time thereafter, had a prototype, had ever attempted
16 to develop a prototype.

17 The real development efforts at Baxter didn't
18 get under way until — and I don't want to, you know, make
19 representations on the record that may be contradicted by
20 the witnesses. But my understanding is that the
21 development efforts at Baxter didn't get under way until
22 the latter part of '91 or the early part of '92.

23 That's one of the reasons they were interested
24 in distribution rights as a potential. You heard a lot
25 about discussions of distribution.

1 When you are going to make a big investment
2 in a product line, one alternative to consider is, Well,
3 should we take, you know — if somebody is going to be in
4 the market ahead of us, maybe it makes more sense just to
5 distribute that product rather than putting the millions
6 of dollars into the product that it will take to bring it
7 to market.

8 CellPro expressed some interest in that. In
9 fact, they expressed some interest in that even before
10 early '92. That is to say, interest in entering some kind
11 of distribution relationship with Baxter.

12 But the parties couldn't reach agreement on
13 that because Baxter wanted some distribution rights in
14 the U.S. and ultimately CellPro was unwilling to give
15 them any distribution rights in the U.S.

16 Now, the point is CellPro had a head start.
17 They had, I think by their own documents, working
18 prototypes of documents by the time of the hypothetical
19 negotiation. I think by the third quarter of '90.

20 Baxter didn't even have a prototype.
21 Becton Dickinson hadn't attempted to develop a prototype
22 of a therapeutic product.

23 And we agree that the head start that CellPro
24 had would have been a relevant factor in the hypothetical
25 negotiation.

1 But the notion that Baxter didn't have a
2 working antibody — that is to say an antibody that
3 would work in a commercial product — is nonsense, and
4 these gentlemen to my left know that.

5 The MY-10 antibody is not the antibody that
6 Baxter uses in its product. It, I assume, at some point
7 in time, decided which of the many antibodies available
8 to it it wished to use in the product.

9 To go back to the failed experiments, because
10 this is what got us on to this discussion, your Honor,
11 the Court will remember that the great majority of those
12 so-called failed experiments weren't failed experiments,
13 because there was not even a working fusion produced.

14 MR. WARE: Yes. Let me —

15 MR. ELLIS: I'm sorry.

16 MR. WARE: Let me just add something here.

17 MR. BLOOMBERG: May I make just a comment
18 with respect to Mr. —

19 MR. WARE: The Court has already held that
20 those failed fusions are irrelevant, period. And they
21 clearly have nothing to do with the position of Baxter
22 in 1990, when Baxter is engaged in a hypothetical
23 negotiation.

24 And I think what's going on here, I think
25 it's perfectly evident that CellPro does not want to run